Malaysian Indian Congress & Ors v Makkal Osai Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–(S6)–23–52 OF 1999
KAMALANATHAN RATNAM J
10 OCTOBER 2000

Civil Procedure *— Affidavits — Affidavit in reply — Time limit for filing and service — Affidavit in reply must be filed and served on the other party within 14 days from the date on which affidavit he intends to reply was served on him — Whether time started to run upon service of unsealed or sealed copy of summons — Whether fixed case management dates and application for next hearing of case management dates relevant to application — Rules of the High Court 1980, O 32 r 13(2)(b)*

The plaintiffs sued the defendants for libel. The defendants sought for further and better particulars of certain paragraphs of the plaintiffs' reply to their defence. In the course of filing their respective affidavits for and against the said application, the defendants took a preliminary objection in respect of an affidavit filed by the plaintiffs in reply, contending that it was filed contrary to O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC').

Held, dismissing the preliminary objection:

(1) Until the summons was sealed, the affidavit in support had no legal effect and therefore it did not 'create any obligation on the part of the party served with such an affidavit, to reply to it'. This, to the court, is reasonable. The party served with an unsealed copy of the application and the supporting affidavit will not know when the application was actually sealed, until such sealed copy is served on him. The 14 day period would run not from the date of service of the unsealed copy of the summons, but from the date of the service of the sealed copy of the summons (see pp 255E, 256B–C); *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 followed.

(2) Although the court in the present case has fixed case management dates and the application for hearing on the next case management, that cannot be seen to give the defendants a right to rely on the service of an unsealed copy of the application as sufficient service in respect of O 32 r 13(2)(b) of the RHC. The preliminary objection is therefore dismissed (see p 256F).

[**Bahasa Malaysia summary**

Plaintif-plaintif telah menyaman defendan-defendan untuk libel. Defendan-defendan memohon butir-butir lanjut dan seterusnya perenggan-perenggan tertentu terhadap jawapan plaintif-plaintif kepada pembelaan mereka. Di dalam tempoh memfailkan afidavit-afidavit masing-masing untuk dan terhdap permohonan tersebut,

defendan-defendan telah membuat satu bantahan awal berhubung satu afidavit yang difailkan oleh plaintif-plaintif semasa menjawab menegaskan bahawa ia telah difailkan bertentangan dengan A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). A

Diputuskan, menolak bantahan awal tersebut: B

(1) Sehingga saman dimeteraikan, afidavit sokongan tdak mempunyai kesan undang-undang dan oleh itu ia tidak 'membentuk apa-apa obligasi ke atas pihak yang disampaikan afidavit tersebut, untuk menjawabnya'. Ini, pada mahkamah, adalah munasabah. Pihak yang disampaikan dengan sesalinan permohonan yang tidak dimeteraikan dan afidavit sokongan C tersebut tidak akan mengetahui bila permohonan tersebut sebenarnya dimeteraikan, sehingga salinan yang dimeteraikan tersebut disampaikan ke atas beliau. Tempoh 14 hari akan bermula bukan dari tarikh penyampaian salinan saman yang tidak dimeteraikan, tetapi dari tarikh penyampaian salinan saman yang dimeteraikan (lihat ms 255E, 256B–C); P*erbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 diikut. D

(2) Walaupun mahkamah di dalam kes ini telah menetapkan tarikh-tarikh pengendalian kes dan permohonan untuk perbicaraan pada pengendalina kes yang berikutnya, ia tidak boleh dilihat sebagai memberikan defenda-defendan satu hak untuk bergantung E kepada penyampaian salinan permohonan yang tidak dimeteraikan tersebut sebagai penyampaian yang mencukupi menurut A 32 k 13(2)(b) KMT. Bantahan awal tersebut dengan itu ditolak (lihat ms 256F).]

F

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–213.

Cases referred to G

Kuala Lumpur Securities Sdn Bhd v Lee Chooi Mee Shah Alam High Court, Civil Suit No 22–229–96, unreported (refd)

Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong [1996] 3 MLJ 85 (folld)

Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd [1997] 1 MLJ 581 (refd) H

Legislation referred to

Rules of the High Court 1980 O 2 r 1(1), 32 r 2(1), 32 r 13(2)(b)

S Nanthabalan (*Sujatabalan* with him) (*Shook Lin & Bok*) for the plaintiffs. I

Saraswathy Kandasami (*Kandasami & Co*) for the defendants.

Kamalanathan Ratnam J:

Facts

The plaintiffs sued the defendants for libel. For the purposes of deciding the present issue before me, I do not have to state the full facts. The defendants sought, by way of encl 75, further and better particulars of certain paragraphs of the plaintiffs' reply to their defence. In the course of filing their respective affidavits for and against the said application, the defendants took a preliminary objection in respect of an affidavit filed by the plaintiffs in reply, contending that the said encl 79 was filed contrary to O 32 r 13(2)(b) of the Rules of the High Court 1980 ('the RHC').

Findings of the court

The defendants had on 16 August 2000 served an unsealed copy of the application (encl 75), together with the supporting affidavit, on the plaintiffs. Relying on *Structural Concrete Sdn Bhd & Ors v Wing Tiek Holdings Bhd* [1997] 1 MLJ 581, Cik Saraswathy for the defendants argued that the affidavit in reply (encl 79) ought to have been served on her on or before 30 August 2000. Since it was only served on 7 September 2000, she argued that the said affidavit ought to be rejected.

Mr Nanthabalan for the plaintiffs relied on *Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong* [1996] 3 MLJ 85 which is another decision of another panel of the Court of Appeal which held that the 14 day period would run not from the date of service of the unsealed copy of the summons, but from the date of the service of the sealed copy of the summons. Faced with these two conflicting decisions of the Court of Appeal, the parties moved this court to decide on this issue before they would proceed on the substantial application.

It is most unfortunate that in *Structural Concrete* the court was only referred to the earlier High Court decision in *Pua Lai Ong* and not to the decision of the Court of Appeal. In *Structural Concrete*, the court pointed out that the lower court had based its decision relying on O 32 r 2(1) of the RHC, in that the issue of a summons by which an application in chambers is to be made takes place on its being sealed by an officer of the registry. What this means is that until the summons is sealed, there is in actual fact no application pending. There was another factor for the consideration of the Court of Appeal in *Structural Concrete*. It considered the fact that the High Court Judge had also held that, 'the delay' of one day did not make much of a difference as the curative provision of O 2 r 1(1) of the RHC could be invoked. There was an excess of a day in that the affidavit was filed one day after the 14 day period. Having pointed out these two factors, the Court of Appeal in *Structural Concrete* said at p 586 as follows:

> However, we would like to add that the critical words in O 32 r 13(2) — for the purposes of computation of time — are 'within 14 days from the date *of the filing* of the application' and in O 32 r 13(2)(b) within 14 days from the date of service.

> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently, we are unable to agree with the part of the judgment of the learned judge in the court below and in the case of *Pua Lai Ong* earlier referred to.

The Court of Appeal in *Structural Concrete* was also of the view that the object of the exercise of serving the other party the unsealed copy was to give early notice. Now, considering the decision of the Court of Appeal in *Pua Lai Ong*, it seems clear that the rationale for its decision was premised on the fact that until the summons was sealed, the affidavit in support *had no legal effect* (Emphasis added), and therefore it did not 'create any obligation on the part of the party served with such an affidavit, to reply to it'. This, to my mind, is reasonable. The party served with an unsealed copy of the application and the supporting affidavit will not know when the application was actually sealed, until such sealed copy is served on him. For all intents and purposes, service of an unsealed copy would put the party served on notice to start gathering his materials and to be ready to file the affidavit in reply within time when served. That is all. Faced with the dilemma of having two conflicting decisions of the Court of Appeal, I take comfort in the decision of my learned brother, Low Hop Bing J, who in a recent judgment dated 12 May 2000 in Shah Alam High Court, Civil Suit No 22–229–96 in *Kuala Lumpur Securities Sdn Bhd v Lee Chooi Mee* Shah Alam High Court, Civil Suit No 22–229–96, unreported, faced with a similar situation, elected to rely on the decision of the Court of Appeal in *Pua Lai Ong*. I take the same course.

In the case before me, Cik Saraswathy argued that when the matter was before me I had already fixed the hearing date for the said application, even before the summons was sealed. That may be so. But O 32 r 2(1) clearly stipulates that the issue of the summons only takes place when it is sealed. As is my practice, I have case management dates and no doubt I had fixed the application for hearing on the next case management date, but that cannot be seen to give the defendants a right to rely on the service of an unsealed copy of the application as sufficient service in respect of O 32 r 13(2)(b) of the RHC. The preliminary objection is therefore dismissed. In fairness to the parties, costs will be costs in the cause.

Preliminary objection dismissed.

Reported by Wong Ee Lynn